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No. 01-1229

In the Supreme Court of the United States

PIERCE COUNTY, PETITIONER

v.

IGNACIO GUILLEN, LEGAL GUARDIAN OF JENNIFER GUILLEN AND ALMA GUILLEN, MINORS, ET AL.

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF WASHINGTON

REPLY BRIEF FOR THE UNITED STATES

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TABLE OF CONTENTS

	Page
A. The scope of Section 409	1
1. Purpose and proper construction of Section 409	1
2. Respondents' construction of Section 409	2
3. Petitioner's construction of Section 409	5
B. The constitutionality of Section 409	8
1. Spending Clause	8
2. Commerce Clause	15
3. Tenth Amendment	16

TABLE OF AUTHORITIES

Cases:

Bennett v. *Kentucky Dep't of Educ.*, 470 U.S. 656 (1985)	12
Davis v. *Monroe County Bd. of Educ.*, 526 U.S. 629 (1999)	12
Dice v. *Akron, Canton & Youngstown R.R.*, 342 U.S. 359 (1952)	19
Felder v. *Casey*, 487 U.S. 131 (1988)	19
John Doe Agency v. *John Doe Corp.*, 493 U.S. 146 (1989)	3, 5
Light v. *State*, 560 N.Y.S.2d 962 (Ct. Cl. 1990)	6
Miller v. *French*, 530 U.S. 327 (2000)	4
New York v. *United States*, 505 U.S. 144 (1992)	11, 17, 18
Oklahoma v. *United States Civil Serv. Comm'n*, 330 U. S. 127 (1947)	17-18
Pennhurst State Sch. & Hosp. v. *Halderman*, 451 U.S. 1 (1981)	11, 12
Printz v. *United States*, 521 U.S. 898 (1997)	18
Reno v. *Condon*, 528 U.S. 141 (2000)	18
Robertson v. *Seattle Audubon Soc'y*, 503 U.S. 429 (1992)	17
Rust v. *Sullivan*, 500 U.S. 173 (1991)	4

Cases—Continued: Page

Salinas v. *United States*, 522 U.S. 52 (1997) 12, 17
South Dakota v. *Dole*, 483 U.S. 203 (1987) 8, 14, 15, 17
Stone v. *INS*, 514 U.S. 386 (1995) 4
Turner Broad. Sys., Inc. v. *FCC*, 520 U.S. 180 (1997) 10
United States Dep't of Justice v. *Reporters Comm. for Freedom of the Press*, 489 U.S. 749 (1989) 6
United States v. *Lopez*, 514 U.S. 549 (1995) 6

Constitution and statutes:

U.S. Const.:
Art. I, § 8:
Cl. 1 (Spending Clause) 8, 9, 19
Cl. 3 (Commerce Clause) 15, 16, 19
Cl. 18 (Necessary and Proper Clause) 12, 19
Art. VI, Cl. 2 (Supremacy Clause) 18
Amend. X 17, 18, 20
5 U.S.C. 552(b)(7) 5
23 U.S.C. 130 ..... 9, 13
23 U.S.C. 133(d)(1) 13
23 U.S.C. 144 ..... 9, 13
23 U.S.C. 152 ..... 6, 7, 9, 10, 11, 13
23 U.S.C. 152(a)(1) 11
23 U.S.C. 152(a)(2) 11
23 U.S.C. 402 ..... 8, 9
23 U.S.C. 402(k)(1) 8, 9
23 U.S.C. 409 ..... *passim*

Miscellaneous:

H.R. Rep. No. 665, 99th Cong., 2d Sess. (1986) 10
U.S. Dep't of Transportation, Federal Highway Administration, *Supplementary Tables* (visited Sept. 25, 2002):
<http://www.fhwa.dot.gov///legsregs/directives/notices/n4510436/n4510436.htm> 14

Miscellaneous—Continued: Page

<http://www.fhwa.dot.gov///legsregs/directives/notices/n4510456/n4510456.htm> 14
<http://www.fhwa.dot.gov///legsregs/directives/notices/n4510479/n4510479.htm> 14

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A. The Scope of Section 409

1. *Purpose and Proper Construction of Section 409*

Section 409 of Title 23, U.S.C., bars the admission into evidence in state and federal court proceedings of reports, data, and information that are

> compiled or collected for the purpose of identifying, evaluating, or planning the safety enhancement of potential accident sites, hazardous roadway conditions, or railway-highway crossings, pursuant to sections 130, 144, and 152 of this title or for the purpose of developing any highway safety construction improvement project which may be implemented utilizing Federal-aid highway funds.

Section 409 further provides that such materials are not subject to discovery in judicial proceedings. As the con-

curring justices in the Washington Supreme Court explained, those statutory prohibitions are designed to ensure that States and local jurisdictions will not be deterred by concerns about liability and litigation from collecting and compiling information necessary to participate in the federal programs for highway safety improvement. "By preventing a litigant from gaining access to information that has been 'collected' for purposes of securing federal funding, Congress has made the litigant no better off than they would have been had the State not participated in the funding program." Pet. App. A127.

In light of that congressional purpose, Section 409 should be construed to bar discovery of information from a state or local agency that (a) generated the information for the purpose of obtaining approval to expend federal highway-safety funds, or (b) obtained the information from elsewhere (including another state or local agency) for that purpose. See Gov't Br. 28-36. Section 409 also applies to information that is originally collected for the purpose of obtaining such approval and is then transmitted to another agency, even when the information is sought from the transferee agency, and even if that agency uses the information solely for non-federal purposes. See *id.* at 32 n.24. Construed in that manner, Section 409 adequately ensures that the prospect of discovery and subsequent civil liability does not discourage state and local agencies from applying for federal highway-safety funds and from assimilating complete and accurate data in connection with their participation in federal highway safety programs.

2. *Respondents' Construction of Section 409*

Respondents concede that the interpretation of Section 409 set forth in the United States' opening brief is "reasonable, follows rules of statutory construction, and construes the Act in a functional manner." Resp. Br. 25.

Respondents nevertheless urge a narrower construction of Section 409. They argue (Resp. Br. 22-23, 25-26) that Section 409 applies only to reports and data that an agency *itself* has generated for the purpose of applying for federal highway-safety funding, and not documents that the agency obtains from elsewhere.[1] That proposed construction, however, is not faithful to the language of Section 409, which protects reports and data "compiled *or collected*" for specified federal purposes. Respondents' construction would essentially read the words "or collected" out of Section 409—a reading that is particularly flawed in light of Congress's addition of that phrase in 1995 to make clear that the prohibition covers materials that an agency applying for federal funds has obtained from elsewhere, even before those materials have been made part of a formal report, and to resolve a disagreement among the lower courts on that question. See Gov't Br. 5-6. Whether or not such documents are properly characterized as "compiled" for the specified federal purposes,[2] Congress's addition of the phrase "or collected" brings them within the scope of Section 409. That also is the only conclusion consistent with the bedrock principle of statutory construction that "[w]hen Congress acts to amend

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[1] Respondents' construction of Section 409 would therefore produce the same practical result as the decision of the Washington Supreme Court, although by means of statutory construction rather than by the announcement of a rule of constitutional law.

[2] In an analogous context, this Court has construed the word "compiled" to reach documents that were assembled from other sources, as well as documents that were originally generated by the entity from which they are requested. See *John Doe Agency* v. *John Doe Corp.*, 493 U.S. 146, 153-154 (1989). The term "compiled," standing alone, may be ambiguous on that point. See *id.* at 161 (Scalia, J., dissenting). But Congress's decision to extend Section 409 to reach reports that were "collected" *as well as* "compiled" for specified federal purposes leaves no doubt that it intended to reach information obtained from other sources.

a statute, [the Court] presume[s] it intends its amendment to have real and substantial effect." *Stone* v. *INS*, 514 U.S. 386, 397 (1995).

The only reason respondents advance in support of their proposed alternative construction is that it would avoid the need to resolve any questions about the constitutionality of Section 409 in this particular case. See Resp. Br. 22-23, 25-26. As explained below (see pp. 14-15, *infra*), the United States' interpretation of Section 409 presents no constitutional difficulty, because it bars discovery and admission into evidence only of information that is integrally related to and was generated as part of the federal safety improvement programs. But in any event, a court's duty to construe statutes to avoid a difficult constitutional question "is qualified by the proposition that avoidance of a difficulty will not be pressed to the point of disingenuous evasion." *Rust* v. *Sullivan*, 500 U.S. 173, 191 (1991) (internal quotation marks omitted); accord *Miller* v. *French*, 530 U.S. 327, 341 (2000). The canon of avoiding constitutional doubt cannot be stretched so far as to warrant excising language from the statute, which would be the result of respondents' submission. Moreover, even under respondents' construction of Section 409, that provision would *sometimes* have the effect of overriding state-law rules governing the admissibility of evidence in tort suits against state and local governmental bodies. That would appear sufficient to render the statute unconstitutional under the theories that respondent advances in this Court. See Resp. Br. 30-44. Acceptance of respondents' proposed narrowing construction therefore would not ultimately obviate the need for a judicial determination of Section 409's constitutionality.

Amicus Washington State Trial Lawyers Association Foundation (WSTLAF) argues (Br. 17) that Section 409 reaches only information that was "compiled or collected *solely* for the specified federal purposes." That submission is

not consistent with the plain language of Section 409. By its terms, Section 409 anticipates that information originally generated for a nonfederal purpose may become privileged if it is thereafter "collected" for the purpose of applying for federal highway-safety funds, insofar as that information is held by the agency involved in the federal application process. (The information will, however, remain nonprivileged as held by the entity that originally generated it for nonfederal purposes. See Gov't Br. 30-36; pp. 5-8, *infra*.) The protection conferred by Section 409 therefore extends beyond information that is compiled and collected *solely* for the specified federal purposes.

3. *Petitioner's Construction of Section 409*

Petitioner Pierce County, by contrast, argues (Br. 39-44) that when material is initially obtained by one state or local agency for routine state or local purposes unrelated to the federal highway safety improvement programs, and a copy of that material is subsequently furnished to a different state or local agency that uses it for the specified federal purposes, the coverage of Section 409 is extended to reach even the original copy of the material that remains in the custody of the first agency. Under that construction of Section 409, an accident report that is initially *not* privileged from discovery would *become* privileged merely because a copy was shared with others.[3] That result is not supported by the text,

[3] In advocating that construction of Section 409, amicus State of Louisiana relies (Br. 20-22) on *John Doe Agency* v. *John Doe Corp.*, 493 U.S. 146 (1989), in which this Court held that records prepared by one agency for non-law enforcement purposes, and subsequently transferred to another agency for use in law enforcement activities, were "compiled for law enforcement purposes" within the meaning of 5 U.S.C. 552(b)(7). In *John Doe Agency*, however, the plaintiff requested records in the possession of the *transferee* law enforcement agency, which had obtained custody over the *originals* of the records. See 493 U.S. at 149. The case did not involve a request for information from an agency that had

legislative history, or purposes of Section 409. Section 409 provides that reports "compiled or collected" for a specified federal "purpose" are not subject to discovery, thereby making the application of the privilege turn on the purpose of the particular collection or compilation that is being sought. In particular, Section 409 does not provide (as the County suggests) that an agency that originally "compiled" information for a nonfederal purpose is entitled to claim the benefit of that privilege merely because that information was subsequently "collected" for federal purposes *by someone else*. In the hands of the originating agency, the information remains compiled for a nonfederal purpose.[4]

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transferred *copies* of records to another agency for the receiving agency's law enforcement purposes, while retaining the originals for its own, non-law enforcement-related functions.

[4] The County observes (Br. 40-41) that Congress intended to disapprove at least some decisions that had narrowly construed Section 409, to reach only reports actually generated by the agency that applied for federal highway-safety funding. But while Congress plainly wanted to extend the protection of Section 409 to information that *such agencies obtained* before they included that information in formal or bound reports submitted as part of the federal application process, the legislative history nowhere suggests that Congress also intended to reach backwards to extend a privilege to the original source of the information, when the information was not originally collected for Section 152 purposes and would have been nonprivileged in the hands of that source before it was transmitted to the agency applying for Section 152 funds. Congress sought to prevent tort plaintiffs from obtaining an advantage as a result of the state or local agency's *compilation* or *collection* of information under the federal program, cf. *United States Dep't of Justice* v. *Reporters Comm. for Freedom of the Press*, 489 U.S. 749 (1989), in order "to keep the record-keeping required by Federal funding provisions from providing an additional, virtually no-work, tool for direct use in private litigation." *Light* v. *State*, 560 N.Y.S.2d 962, 965 (Ct. Cl. 1990). It is not necessary, in order to accomplish that purpose, to extend the privilege to information that remains in the hands of the agency that originally obtained it solely for nonfederal (and therefore non-privileged) purposes.

Nor is the County's construction of Section 409 necessary to ensure that state and local agencies are not discouraged from applying for federal highway-safety funds. The County observes (Br. 42) that, because its Public Works Department receives accident reports from the state patrol, that department serves as a "central location for *all* accident history concerning its roads created by *all* law enforcement" agencies.[5] The County then suggests (Br. 43) that extending the protection of Section 409 to all governmental entities that hold the documents or information in question will encourage governments to participate in the federal application process.

Under the County's construction, Section 409 would preclude discovery and introduction into evidence of documents that state and local governments would have created and maintained even if federal highway-safety funding programs had never been enacted. The background to Section 409 does not suggest that Congress believed that state and local governments needed or were entitled to such an *extraordinary incentive* to apply for federal funds. Rather, Congress sought to ensure that the prospect of civil discovery

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[5] If the County Public Works Department obtained that information to use in the Section 152 process, that department could claim the protection of Section 409. But the agencies from which it received those accident reports would not be entitled to that protection if those agencies collected and retained the information solely for nonfederal purposes. Those originating agencies might, however, be able to argue that state law provided them with another basis for resisting discovery of the accident reports—for example, by arguing that it would be unduly burdensome to require the agency to retrieve the reports in a manner useful to the tort plaintiff. See Gov't Br. 31 n.23. Moreover, if particular reports are originally prepared for nonfederal purposes, but are subsequently maintained or indexed in a particular manner (*e.g.*, by accident location) in order to facilitate the State's application for federal highway-safety funds, Section 409 would preclude the plaintiff from requiring the agency to utilize that indexing scheme in responding to a discovery request.

and/or subsequent liability did not operate as an artificial *dis*incentive to participation in the federal safety improvement programs or to the gathering and assembling of complete and accurate data in the course of that participation. The construction of Section 409 that the United States proposes fully achieves that congressional objective.

B. The Constitutionality of Section 409

1. *Spending Clause*

a. Respondents contend (Br. 4-9, 30-33) that Section 409 exceeds Congress's power under the Spending Clause because (respondents argue) Section 409 was not needed to promote transportation safety, and therefore was not a necessary or proper measure to "provide for the * * * general Welfare of the United States" (U.S. Const. Art. I, § 8, Cl. 1). That contention lacks merit. This Court has stressed that "courts should defer substantially to the judgment of Congress" in determining whether a law promotes the general welfare, *South Dakota* v. *Dole*, 483 U.S. 203, 207 (1987), and indeed has noted that "[t]he level of deference to the congressional decision is such that the Court has * * * questioned whether 'general welfare' is a judicially enforceable restriction at all," *id.* at 207 n.2.

Respondents' attack on the need for Section 409 has two prongs. First, respondents observe (Br. 4-6) that 23 U.S.C. 402 (which was enacted in 1966) separately requires the States to establish a highway safety program to reduce traffic-accident deaths and injuries, and to collect data on such deaths and injuries; that Section 402(k)(1) encourages the States to develop computerized safety recordkeeping systems to fulfill their Section 402 datakeeping obligations; and that reports, lists, or schedules prepared by or for States under Section 402(k)(1) are not admissible into evidence in any damages action. Respondents maintain that Section 409 is redundant because the objective for which it was

designed—the promotion of transportation safety by ensuring that States and local governments are candid, accurate, and thorough in evaluating safety hazards on their roads—would have been accomplished by Section 402 in any event.

Even if Section 409 and Section 402(k)(1) might sometimes overlap and cover the same information, it is difficult to see how a provision of federal law that is merely redundant in a particular application would have any incremental effect at all on state judicial proceedings, much less result in an independent intrusion on state prerogatives that could exceed Congress's powers under the Spending Clause. In any event, Congress evidently concluded that Section 409 would furnish additional protection and thereby further promote transportation safety, and there is no basis for second-guessing that determination. Section 409 applies broadly to information compiled or collected for the purpose of participating in safety programs under 23 U.S.C. 130, 144, and 152, "or for the purpose of developing any highway safety construction improvement project which may be implemented utilizing Federal-aid highway funds." 23 U.S.C. 409. Section 409 expressly protects the information to which it applies from discovery in addition to use at trial, while Section 402(k)(1) does not. And Section 409 applies whether or not the information was prepared for or is derived from a computerized records system, and whether or not it is related to the receipt of a federal grant under Section 402(k)(1).

Second, respondents argue (Br. 6, 31) that Section 409 was not necessary to ensure that States would apply for federal hazard elimination funds because there is no evidence that any State has ever failed to apply for such assistance. Section 409, however, serves not only to remove a possible disincentive to the submission of funding applications, but also to promote federal interests by ensuring that States

(and their subdivisions), in participating in those programs, are thorough and candid in evaluating hazards within their jurisdictions. See H.R. Rep. No. 665, 99th Cong., 2d Sess. 56 (1986) (explaining that version of Section 409 contained in predecessor bill was intended "to encourage greater accuracy and completeness in the compilation of [covered materials], by preventing [the materials] from being used in any judicial proceeding, thereby improving their quality as a basis for programming."). Contrary to respondents' suggestion (Br. 31), Congress was not required to assemble an evidentiary record documenting the basis of that concern. As this Court has repeatedly recognized, "Congress is not obligated, when enacting its statutes, to make a record of the type that an administrative agency or court does to accommodate judicial review." *Turner Broad. Sys.* v. *FCC*, 520 U.S. 180, 213 (1997). That principle has particular force in the present constitutional context, where the question is whether Congress has acted properly to promote the "general welfare"—an issue on which Congress's judgment is reviewable, if at all, under an extremely deferential standard. See p. 8, *supra*.

b. Respondents further argue (Br. 33-35) that Congress did not unambiguously place the States on notice that, as a consequence of applying for or accepting federal highway-safety funds, state courts must respect and apply the evidentiary privilege of Section 409. That submission is also without merit. It is true that Section 409 is not framed expressly as a condition that a State must meet before receiving federal funds or as a pledge that a State must undertake when it accepts such funds. Moreover, an entity (such as Pierce County) need not actually receive federal funds to ameliorate a particular hazardous condition in order to claim the benefit of Section 409 in later litigation involving that specific hazard: the protection afforded by that Section

would be available to the County even if its application for Section 152 funds for a particular project were unsuccessful.

Nonetheless, conditions on participation in a federal program need not take any one form, and here the evidentiary privilege required by Section 409 plainly is a condition on a State's participation in a federal funding program. The privilege is not free-standing and categorically mandated by Congress, but rather attaches only as a result of the State's voluntary decision to apply for federal financial assistance for highway-safety projects. The Washington legislature could choose to finance the elimination of hazardous road conditions within the State entirely through state funds. Cf. *New York* v. *United States*, 505 U.S. 144, 174 (1992) ("The State need not * * * participate in any federal program, if local residents do not view such * * * participation as worthwhile.").[6] If the State chooses to apply for federal highway-safety funds, however, subsequent discovery and evidentiary disputes regarding documents compiled or collected for that purpose will be governed by Section 409.

Respondents (Br. 34), joined by amici Lynn A. Baker & Mitchell N. Berman (Br. 12-14), also argue that Section 409 is not an unambiguous condition on participation in a federal

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[6] Amici Whitmers argue (Br. 22-23) that Section 409 is not a condition attached to a State's voluntary participation in a federal funding program but rather part of a legal obligation to participate in that program, directly imposed on the States by Congress. Amici stress that 23 U.S.C. 152(a)(1) provides that the States "shall" collect and compile the data necessary to obtain funding under Section 152. Amici overlook the fact that 23 U.S.C. 152(a)(2) expressly provides that, in carrying out the Section 152 program, a State "may, at its discretion," identify hazardous conditions and develop projects to ameliorate those hazards. Thus, Section 152(a)(2) confirms that participation in the Section 152 program is left to a State's free choice. Nor has the Secretary of Transportation ever understood Section 152 "to be something other than a typical funding statute." *Pennhurst State Sch. & Hosp.* v. *Halderman*, 451 U.S. 1, 22 (1981).

spending program because different constructions of that statutory privilege have been and could be put forward. Even respondents acknowledge (Br. 28-29), however, that Section 409 bars discovery and admission into evidence of at least *some* materials "collected or compiled" for federal purposes. The existence of judicial disagreement as to the exact scope of a provision that is unquestionably a condition on federal spending does not deprive a State of the requisite notice. Although interpretation of Section 409 is necessary to determine the precise extent of its coverage, Section 409 is unambiguous in establishing an evidentiary privilege as a consequence of participation in a federal funding program. Cf. *Davis* v. *Monroe County Bd. of Educ.*, 526 U.S. 629, 638-653 (1999); *Bennett* v. *Kentucky Dep't of Educ.*, 470 U.S. 656, 669-670 (1985). Section 409 does more than "express a congressional preference," *Pennhurst State Sch. & Hosp.* v. *Halderman*, 451 U.S. 1, 19 (1981): it establishes a federal rule that governs discovery and evidentiary disputes if, but only if, a State applies for specified forms of federal aid.

Moreover, whether or not Section 409 is regarded as a typical condition attached to a federal spending program, it may be upheld as an exercise of Congress's power under the Necessary and Proper Clause, U.S. Const. Art. I, § 8, Cl. 18, to ensure that federal spending for highway-safety projects achieves its intended objectives and to further the "integrity and proper operation of the federal program." *Salinas* v. *United States*, 522 U.S. 52, 61 (1997). Amicus Association of Trial Lawyers of America (ATLA) argues (Br. 19-21) that Section 409 is not "necessary" to ensure the effectiveness of the underlying spending programs because (amicus suggests) a State that is concerned that information collected and compiled for federal purposes could be used against it (or its local governments) in litigation could create an evidentiary privilege for its own benefit as a matter of state law. Congress, however, is entitled to choose the measures

it deems necessary to ensure the efficacy of a *federal* safety program–including the efficacy of safety data and reports on which the federal government relies along with the States—even if a particular State might reach a different conclusion or might simply fail to enact appropriate safeguards.

c. Amicus ATLA also argues (Br. 15) that Section 409 is impermissibly coercive of the States because a State that declines to accept the Section 409 privilege must lose "100% of its share of highway funds." That contention lacks merit. Contrary to amicus's suggestion (*ibid.*), a State that is unwilling to accept the application of the Section 409 privilege in its courts need not "decline to participate in the highway-aid program altogether." According to the Department of Transportation, during the fiscal years 2000-2002, federal funds that are available only for the various safety-improvement programs to which the Section 409 privilege applies accounted, on a nationwide basis, for between 12%-13% of total federal highway assistance to the States. For the State of Washington, those funds accounted for between 18%-24% of total federal highway assistance.[7] Thus, even if a State

[7] Under 23 U.S.C. 133(d)(1), "10 percent of the funds apportioned to a State under [23 U.S.C.] 104(b)(3) for the surface transportation program [STP] for a fiscal year shall only be available for carrying out sections 130 and 152 of this title." The percentages in the text were computed by adding (for each fiscal year) 10% of the STP allotment (for the nation and for the State of Washington) to the amount of payments for the highway bridge replacement and rehabilitation program under 23 U.S.C. 144, and then comparing those combined amounts to the total highway funds available to the States collectively and to Washington State. For fiscal years 2000-2002, the sums reserved for Section 130 and 152 programs accounted for between 1.7%-1.9% of total federal highway assistance to the States, and between 1.9%-2.0% of federal highway assistance to the State of Washington. For the same fiscal years, federal payments under the Section 144 bridge program accounted for between 10%-12% of total federal highway assistance to the States, and between 16%-22% of federal

declined to participate in any federal program to which Section 409 would apply, it would remain eligible to receive the large majority of federal highway funds available to it.

In any event, even assuming that States will perceive a strong practical incentive to participate in the federal funding programs referenced in Section 409, any intrusion on state prerogatives that the protection afforded by Section 409 might entail is minimal in light of the distinctively "federal" character of the documents to which Section 409 applies. The limited nature of that intrusion results not simply from the fact that application of Section 409 is contingent on a State's voluntary decision to participate in federal highway-safety funding programs, and thereby to generate reports and data to which the protection of Section 409 attaches. In addition, the class of documents to which Section 409 applies is limited by its terms to records having a direct connection to the underlying federal programs—*i.e.*, to information "compiled or collected for the purpose of" identifying, evaluating, or planning safety enhancement projects to be undertaken using federal financial assistance.

In that respect, the Section 409 privilege is considerably less intrusive than was the condition on federal highway funding—namely, that the State adopt a drinking age of 21—that was upheld by this Court in *South Dakota* v. *Dole*. The Court found that condition to be "directly related to one of the main purposes for which highway funds are expended —safe interstate travel," 483 U.S. at 208, based on evidence that "[t]his goal of the interstate highway system had been frustrated by varying drinking ages among the States

highway assistance to the State of Washington. The underlying figures are *available in* http://www.fhwa.dot.gov///legsregs/directives/notices/n4510479/n4510479.htm (Table 1) (fiscal year 2002); http://www.fhwa.dot.gov///legsregs/directives/notices/n4510456 /n4510456. htm (Table 1) (fiscal year 2001); and http://www.fhwa.dot.gov///legsregs/directives/notices/n4510436 /n4510436.htm (Table 1) (fiscal year 2000).

[because] * * * the lack of uniformity in the States' drinking ages created an incentive to drink and drive," *id.* at 209 (internal quotation marks omitted). The Court found that nexus to be constitutionally sufficient, notwithstanding the dissenting Justice's undisputed observation that the spending condition was "over-inclusive because it stops teenagers from drinking even when they are not about to drive on interstate highways." *Id.* at 214-215 (O'Connor, J., dissenting). The condition established by Section 409, by contrast, is more narrowly tailored to the underlying spending program, since it applies *only* to documents compiled or collected for specified purposes under the federal program itself.[8]

2. *Commerce Clause*

Respondents contend (Br. 38-44) that Section 409 exceeds Congress's power under the Commerce Clause, U.S. Const. Art. I, § 8, Cl. 3. Respondents assert that Section 409 "regulate[s] state court proceedings" (Br. 40) and that because "state judicial proceedings are neither economic nor commercial activities" (Br. 43), Congress is powerless under

[8] Even if no federal highway funds had been available, the State of South Dakota would have established and enforced *some* drinking age. The effect of the spending condition at issue in *South Dakota* v. *Dole* was that the State could receive its full allotment of federal highway funds only by amending its existing law, which permitted the sale to 19-year-olds of beer containing up to 3.2% alcohol. See 483 U.S. at 205. Such a change would have affected the state-law rights of 19- and 20-year-olds within South Dakota even when those persons were not driving on federally-funded interstate highways. Absent the federal highway-safety funding programs referenced in Section 409, however, there would *be* no records "compiled or collected for the purpose of" participating in such programs. Section 409 therefore cannot properly be viewed as inducing the State to adopt a meaningful change in any pre-existing or independent policy regarding the discoverability or admissibility of the particular documents to which the privilege applies.

the Commerce Clause to enact a rule of decision applicable in such proceedings. That argument lacks merit.

Section 409 serves to facilitate efforts by States and localities to evaluate and rectify hazardous highway conditions. Amelioration of such hazards indisputably serves to reduce barriers to interstate commerce. Section 409 is thus an exercise of Congress's established power to protect both the "channels of interstate commerce" and the "instrumentalities of interstate commerce." *United States* v. *Lopez*, 514 U.S. 549, 558 (1995); see Gov't Br. 40-42.

The fact that Section 409 achieves its objectives indirectly (by regulating one aspect of litigation in state or federal court and thereby removing a possible disincentive to the States' ameliorative efforts) does not render it an invalid exercise of Commerce Clause authority. It is well-settled, for example, that Congress's power to regulate interstate commerce includes the power to preempt state-law causes of action altogether if Congress concludes that such lawsuits would disserve federal regulatory objectives. See Gov't Br. 41 n.31. Here, Congress has taken the far more modest step of protecting certain information directly related to the federal program from discovery or admission into evidence in such a lawsuit. Like the evidentiary rule established by Section 409, federal statutory provisions that (expressly or impliedly) preempt state law that confers a cause of action in court might in some sense be characterized as regulating state-court proceedings. But so long as Section 409 constitutes a reasonable means of enhancing the safety of the Nation's transportation system, it falls within the scope of Congress's authority under the Commerce Clause.

3. *Tenth Amendment*

Respondents assert in passing, and only in the Conclusion section of their brief (Br. 44-47), that Section 409 impermissibly interferes with the governmental structures of the

States in violation of the Tenth Amendment. Because that argument is otherwise undeveloped, it is not properly before the Court. Cf. *Salinas* v. *United States*, 522 U.S. 52, 61 (1997) (declining to address point on which litigant had failed to raise "any cognizable challenge" in Supreme Court). Although some of respondents' amici do develop a Tenth Amendment argument, this Court ordinarily does not entertain contentions that are raised only by amici, especially (as here) constitutional challenges of potentially sweeping import that were not addressed by the courts below. See *Robertson* v. *Seattle Audubon Soc'y*, 503 U.S. 429, 441 (1992).[9]

In any event, any Tenth Amendment challenge to Section 409 would be without merit. If Section 409 as applied to state-court litigation is a valid exercise of Congress's spending power (see pp. 8-15, *supra*), it cannot be separately assailed under the Tenth Amendment. This Court has made clear that the Tenth Amendment does not independently limit Congress's power to establish conditions attendant to voluntary participation by the States in federal spending programs. See *New York* v. *United States*, 505 U.S. at 173-174, 188; *South Dakota* v. *Dole*, 483 U.S. at 209-211; *Okla-*

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[9] Respondents also assert in passing in their Summary of Argument (Br. 17-18) that they have standing to challenge Section 409 on Tenth Amendment as well as other constitutional grounds, but they do not develop that specific standing point in the body of their brief. The question whether respondents have standing to challenge Section 409 under the Tenth Amendment may have a different answer from the question whether respondents have standing to challenge Section 409 as exceeding Congress's enumerated powers. See Gov't Br. 23-27. Because the question whether respondents have standing to assert a Tenth Amendment challenge has potentially significant implications, the Court should decline to address it and other Tenth Amendment issues in light of respondents' failure to preserve a Tenth Amendment challenge in this Court.

homa v. *United States Civil Serv. Comm'n*, 330 U.S. 127, 143 (1947). If the State of Washington deems it to be an acceptable consequence of obtaining federal highway-safety funds that Section 409 should operate in its courts, the Tenth Amendment does not prevent the State from agreeing to that result.[10]

Amicus ATLA argues (Br. 9-11, 22-25) that Section 409 violates the Tenth Amendment because Congress has no authority to regulate state tort law. Section 409, however, neither requires a state legislature to enact any rule of law, as in *New York* v. *United States*, 505 U.S. 144 (1992), nor commandeers state executive officials to enforce federal law, as in *Printz* v. *United States*, 521 U.S. 898 (1997). See *Reno* v. *Condon*, 528 U.S. 141, 149-151 (2000). Rather, Section 409 provides only that, if a State chooses to participate in federal highway-safety funding programs, the courts of that State (along with federal courts) must apply a federal rule of privilege to a defined class of discovery and evidentiary disputes involving documents generated under those programs. That result follows from a straightforward application of the Supremacy Clause and raises no Tenth Amendment concern. See also *Printz*, 521 U.S. at 907.

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[10] Amicus ATLA argues (Br. 28-30) that Section 409 violates the Tenth Amendment because it interferes with the States' sovereign right to assign responsibility for evidentiary rules to the courts rather than to the state legislature or executive. Any such "interference," however, is caused solely by the state government's voluntary decision to apply for federal funds. Neither that choice nor the Section 409 privilege is imposed unilaterally by the federal government. Respondents presumably remain free to argue to the Washington courts that, as a matter of state constitutional law, the state legislature and executive branch may not agree to the operation of an evidentiary privilege that the state judiciary has not devised. At most, however, such an argument could establish that Washington is disabled by state constitutional law from applying for federal highway-safety funds, with their attendant conditions; it would not establish that Section 409 violates the United States Constitution.

Congress has undoubted authority under the Spending Clause, Commerce Clause, and Necessary and Proper Clause to require state and federal courts to apply substantive outcome-determinative federal law, and to preempt conflicting state law. See p. 16, *supra*. Since state participation in federal highway-safety funding programs is voluntary, the application of the evidentiary rule in Section 409 as a consequence of that participation is less disruptive of state prerogatives than is routine federal preemption of state law. Congress could constitutionally have provided, as a matter of substantive federal law, that no state or local government could be held liable in damages for failing to ameliorate any hazardous road condition for which that governmental entity had sought federal funds, and it could have preempted the application of any state law that would impose such liability. In Section 409, Congress has taken the lesser, but equally substantive, step of precluding certain evidence from being subject to discovery or admitted into evidence in litigation, *if* the State chooses to apply for specified forms of federal financial assistance.

ATLA also argues (Br. 26) that Congress has no authority to prescribe procedural rules applicable in state courts. This Court has acknowledged the "general and unassailable proposition * * * that States may establish the rules of procedure governing litigation in their own courts." *Felder* v. *Casey*, 487 U.S. 131, 138 (1988). The Court has also stressed, however, that state procedural rules are not exempt from preemption under federal law if Congress determines that a particular procedural rule interferes with legitimate federal objectives. See *id.* at 138-139; *Dice* v. *Akron, Canton & Youngstown R.R.*, 342 U.S. 359, 363-364 (1952) (state-court plaintiff in suit under Federal Employers Liability Act had federal right to jury trial, even though state law would have required bench trial). Moreover, a rule establishing a privilege over records compiled or collected

for a federal program is properly understood as substantive, and in any event poses no Tenth Amendment problems. Nothing in the Tenth Amendment prohibits Congress from protecting a federal interest in confidentiality—for example, in state secrets learned by federal employees—by making that information privileged in state as well as federal courts. And the fact that the State can avoid the privilege entirely by opting out of the federal funding programs for safety projects independently avoids any Tenth Amendment problem.

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For the foregoing reasons, as well as those set forth in our opening brief, the judgment of the Supreme Court of Washington should be reversed, and the case should be remanded for further proceedings.

Respectfully submitted.

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